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Supreme Court of the United States

OCTOBER TERM, 1983

No. ——

HARRY LEVINE, ALBERT RAGUSA, LOUIS WITKIN, ETHEL EPSTEIN and MICHAEL PRESNICK, NANCY VALE and SIDNEY PUDELL, individually and as Chairman, Secretary and Treasurer, respectively, of CITIZENS PARTY OF OCEAN BEACH, an unincorporated association,

Petitioners,

v.

ARTHUR R. SILSDORF,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MILTON S. TEICHER
Attorney for Respondent
666 Fifth Avenue
New York, New York 10103
(212) 586-0541

August 2, 1983

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether this Court should review the order of the New York Court of Appeals in reinstating Respondent's complaint by reason of its stating a good cause of action?

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

During a mayoralty campaign in 1978 the seven Petitioners circulated a printed letter (Exhibit D)[1] which described

[1] (Figures in parentheses refer to pages and exhibits of the Petition for a Writ of Certiorari)

Respondent, the incumbent mayor of the Village of Ocean Beach L.I., New York, who had been in office for twenty-two years, in the following defamatory terms:

> "But in recent years, as more business promoters have seen the opportunity to make money at Ocean Beach, they have found it pays to do business with the mayor... We are concerned because we believe the mayor is profiting from his private law practice at the expense of the Village of Ocean Beach... by unethically representing the people who seek to convert the village into a strip of pizza parlors, frozen custard stands and bars... There is no longer any question about the corruptness of Arthur Silsdorf's administration of the affairs of the Village of Ocean Beach."

Respondent commenced a libel action against Petitioners, setting forth the above language, verbatim, in paragraph 6 of his complaint(E-2).

Although Petitioners now argue that such accusations were merely "opinions", their verified answer nevertheless alleged that the contents of the letter "are true"(F-3).

Petitioners further urge that their charges such as "it pays to do business with the mayor", that the mayor is "profiting from his private law practice at the expense of the Village", that he is "unethically representing the people", and that there is "no longer any question about the corruptness" of the mayor's administration of the affairs of the Village, are protected opinions and not actionable. The Court of Appeals disagreed and held that the truth or falsity of the "facts" recited in the letter upon which Petitioners allege the statements were based, were issues requiring a trial.

Petitioners also groundlessly assert that the Court of Appeals decision will tend to "chill" discussion on public issues and hence constitutes an unreasonable restraint on free speech.

REASONS FOR DENYING THE WRIT

Petitioners raise a false issue in urging that freedom of political expression is on trial in this action and that the decision of the Court of Appeals ran counter to prior decisions of this Court.

On the contrary, the decision of the Court of Appeals followed the law as enunciated by this Court and by other Federal Court decisions. That Court merely restated the well-established principle that "although expressions of opinion are constitutionally protected, accusations of criminal or illegal activity, *even in the form of opinion,* are not." *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, cert. den. 434 US 969 (1977) (Court's emphasis). The Court also cited *Cianci v. New Times Pub. Co.*, 639 F2d 54(2d Cir 1980), and *Buckley v. Littell*, 539 F2d 882, cert. den. 429 US 1062, in support of that proposition.

Petitioners suggest that this Court adopt a novel concept which is wholly at odds with established law. They urge that expressions of opinion, even though founded on false or undisclosed facts, have *absolute immunity*. They conclude that anything goes in a political campaign, including charges of criminal conduct, *even though no basis of fact for such charges exist*. Such a concept is alien to the principles enunciated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *Garrison v. Louisiana* 379 U.S. 64 (1964) and *Cianci, supra*, that false statements of fact are never constitutionally protected.

In *Garrison v. Louisiana, supra*, this Court made it crystal clear that falsehoods, deliberately published, do not enjoy immunity:

> "The use of calculated falsehood, however, would be a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity... That speech is used

as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . .' *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572. *Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.*" (Emphasis added)

Petitioners erroneously rely on *Gertz v. Robert Welch, Inc., supra*, for the proposition that opinions cannot be made the basis of a libel action. On the contrary, *Gertz* specifically held that

"There is no constitutional value in false statements of fact."

The decisions of this Court and of the New York Court of Appeals on the subject of "opinion" immunity were extensively reviewed by the Second Circuit in *Cianci v. New Times Publishing Company, supra*. That Court observed that:

"...Our decision must mean that when an 'opinion' is something more than a generally derogatory remark but is laden with factual content, such as charging the commission of serious crime, the First Amendment confers no absolute immunity, as distinguished from the qualified protection accorded by *Sullivan* in the case of public figures."

The Court continued:

"Accusations of criminal activity, *even in the form of opinion*, are not constitutionally protected . . . While inquiry into motivation is within the scope of absolute privilege,

> outright charges of illegal conduct, if false, are protected solely by the actual malice test. As noted by the Supreme Court of California, there is a critical distinction between opinions which attribute improper motives to a public officer and accusations, *in whatever form*, that an individual has committed a crime or is personally dishonest. No First Amendment protection enfolds false charges of criminal behavior. (Citing cases)." (Court's emphasis)

After noting that nothing in its earlier decisions suggests that disclosure of factual background "would protect as opinion a direct accusation of criminal misconduct," *Cianci* continued:

> "Whatever may be the mode of expression used, if an assertion of guilt is implied or intended, the words will be actionable. *Logan v. Steele*, 1 Bibb 593, 595 (Ky. 1809)."

Even under *New York Times Co. v. Sullivan*, 376 U.S. 254, (1964) relied on by Petitioners, an aggrieved party may, by establishing the falsity of charges of criminal activity, recover damages from his defamers.

This Court, in denying certiorari in *Rinaldi v. Holt, Rinehart & Winston, Inc., supra*, refused to reverse a holding of the Court of Appeals that a lesser charge than in the case at bar, namely that a judge was *"probably corrupt"* was actionable. In the instant case the accusations went far beyond this, including positive charges of criminal activity such as: "there is no longer any question about the corruptness of Arthur Silsdorf's administration of the affairs of the Village of Ocean Beach", business promoters "have found it pays to do business with the mayor", "the mayor is profiting from his private law practice at the expense of The Village of Ocean Beach", and that he is "unethically representing people".

Petitioners' "chilling effect" argument is nothing less than a red herring. No freedom of speech issue is involved here. As one New York Appellate Court stated, the "chilling effect" argument

"has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion even though the case did not remotely concern the question." *Brady v. Ottaway Newspapers, Inc.*, 84 A.D. 2d 226. (NY 2nd Dept., 1981)

Petitioners are attempting to distract attention from the *procedural* issue decided by the Court of Appeals, to a *non*-issue, namely freedom of political expression. That was never an issue and all the Court of Appeals decided was that Respondent's complaint stated a good cause of action and that he had a right to have his day in court.

Further review by this Court is clearly unwarranted.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
August 2, 1983

Respectfully submitted,

MILTON S. TEICHER
Attorney for Respondent
666 Fifth Avenue
New York, New York 10103
(212) 586-0541